IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STERIGENICS U.S., LLC, a Delaware limited liability company,	)	
Plaintiff,	)	
v.	)	No. 19-cv-01219
	)	Hon. Matthew F. Kennelly
JOHN KIM, not individually, but solely in his capacity as Acting Director of the Illinois Environmental Protection Agency, and the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Defendants.	)	

DEFENDANTS' EMERGENCY MOTION TO DISMISS
PLAINTIFF'S COMPLAINT

Defendants, John Kim, not individually, but solely in his capacity as Acting Director of the Illinois Environmental Protection Agency, and the Illinois Environmental Protection Agency, by their attorney Kwame Raoul, Attorney General of the State of Illinois, submit this Emergency Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1).

Introduction

On February 15, 2019, the Illinois Environmental Protection Agency ("IEPA") issued an administrative order ("Seal Order") to Sterigenics U.S., LLC ("Sterigenics" or "Plaintiff") pursuant to section 34(b) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/34(b) (2018). In so doing, IEPA found that Sterigenics' emissions of ethylene oxide, a known human carcinogen, "create an imminent and substantial endangerment to the public health and welfare." (*See* Dkt. 1, Ex. A, ¶ 14.)

On February 18, 2019, Plaintiff Sterigenics filed a Complaint (Dkt. 1.) and Emergency Motion for a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction Against Enforcement of the Seal Order Dated February 15, 2019. (Dkt. 5.)

Plaintiff's Count I (Deprivation of Due Process – 42 U.S.C. § 1983) should be dismissed because it does not state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). IEPA, an Illinois agency, is empowered with a statutory right under Illinois law (415 ILCS 5/34(b) (2018)) to issue a seal order in situations like those that exist here: Sterigenics is emitting a known carcinogen into the air (including uncontrolled and unknown fugitive emissions), and very recent test data show incredibly high concentrations in the area surrounding Sterigenics that cannot be explained. Upon issuance of a seal order, Illinois law then provides companies like Sterigenics with an immediate right to seek injunctive relief before either the Illinois Pollution Control Board or a court of proper jurisdiction. 415 ILCS 5/34(d). Where, like here, there is articulated in a statute a strong public interest in protecting the public health and environment, "the lack of a pre-enforcement hearing does not offend due process principles." *People v. Conrail Corp.*, 251 Ill. App. 3d 550, 560 (4th Dist. 1993). Plaintiff's attempt to plead its way into federal court by bringing a due process claim fails as a matter of law. Nonetheless, pursuant to the Act, Plaintiff has ample opportunity to have its day in a court with the proper jurisdiction.

In addition, Plaintiff's Count II (Improper Use of Section 34(b) Authority) does not independently provide a basis for federal question jurisdiction. Plaintiff alleges that the IEPA, an Illinois agency, in issuing the Seal Order, failed to properly follow Illinois law. (Dkt. 1 ¶ 4.) Any litigation regarding the propriety of that decision belongs before an Illinois state court. In fact, the People properly brought a complaint against Plaintiff in state court in DuPage County, where Sterigenics maintains its facility, *see People of the State of Illinois et al. v. Sterigenics*

U.S., LLC, No. 2018-cv-08010 (N.D. Ill.) ("IAG Action"), and Plaintiff removed it to federal court, claiming that federal law controlled the IEPA's actions. (IAG Action, Dkt. 1.) The People filed a motion for remand, arguing that Sterigenics' preemption claim is an affirmative defense that does not provide for federal question jurisdiction, and the matter is in supplemental briefing before Judge Lee. (IAG Action, Dkt. 28.) Plaintiff's various attempts to litigate this state law matter in federal court should be rejected.

Moreover, this action is barred by the Eleventh Amendment, which "bars federal jurisdiction over suits brought against a state." *MCI Telecomms. Corp. v. Ill. Bell Telephone Co.*, 222 F.3d 323, 336 (7th Cir. 2000).

Because Plaintiff's Due Process claim fails as a matter of law, and no independent basis exists for federal jurisdiction on Count II, which relates only to state law matters, Defendants respectfully request that Plaintiff's Complaint be dismissed.

Background

For more than thirty years, the facility now operated by Sterigenics in Willowbrook, Illinois, has been emitting ethylene oxide gas. (Dkt. 5, ¶ 11.) In December 2016, the federal government finished a ten-year, peer-reviewed evaluation of the carcinogenicity of ethylene oxide.[1] This evaluation, known as the "IRIS," concluded that based on the weight of the current scientific evidence, ethylene oxide is a known human carcinogen that is 30 times more potent at

[1] This Court may take judicial notice of may take judicial notice of an adjudicative fact that is both "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997). *See Integrated Risk Information System (IRIS): Ethylene oxide, History,* U.S. EPA, https://cfpub.epa.gov/ncea/iris2/chemicalLanding.cfm?substance_nmbr=1025#tab-3.

causing cancer than previously estimated.[2] Following this evaluation, the federal government modeled ethylene oxide emissions throughout the country and identified seven census tracts surrounding Sterigenics with a higher than acceptable cancer risk.[3] This modeled risk led the federal government to further model and study ambient ethylene oxide concentrations surrounding Sterigenics' facility in Willowbrook.

In August 2018, the Agency for Toxic Substances and Disease Registry, or ATSDR, a federal public health agency within the United States Department of Health and Human Services, concluded that based on measured and modeled ethylene oxide concentrations in ambient air as of May 2018, "an elevated cancer risk exists for residents and off-site workers in the Willowbrook community surrounding Sterigenics, and these elevated risks present a public health hazard to these populations."[4] Nearly six months later, ethylene oxide monitors around Sterigenics detected ethylene oxide in concentrations far above the May 2018 samples analyzed in the ATSDR report. Very recently, levels of ethylene oxide as high as 320 $\mu g/m^3$ (micrograms (one-millionth of a gram) per cubic meter of air) were detected near Sterigenics. (Declaration of Dyron Hamlin, Dkt. __ (filed contemporaneously in Defendants' Response to the TRO).) Nearly 20,000 people live within a mile of Sterigenics. (IAG Action Dkt. 1, Attachment 1, ¶ 34.) The Village Hall and Police Department are across the street. (*Id.*)

The Illinois Constitution provides that: "the public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations." Ill. Const. 1970 art. XI, § 1. Importantly, it also provides that "each person has the

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[2] *Evaluation of the Inhalation Carcinogenicity of Ethylene Oxide*, INTEGRATED RISK INFORMATION SYSTEM (IRIS), at 1-7 (Dec. 2016), https://cfpub.epa.gov/ncea/iris/iris_documents/docuemtns/toxreviews/1025tr.pdf.

[3] *See* 2014 National Air Toxics Assessment, U.S. EPA, https://www.epa.gov/national-air-toxics-assessment/2014-nata-map.

[4] *See Evaluation of Potential Health Impacts from Ethylene Oxide Emissions,* U.S. DEP'T OF HEALTH & HUM. SERVS. 1 (August 21, 2018).

right to a healthful environment." *Id.* § 2. In fulfillment of the Constitutional requirements to provide a healthful environment and protect each person's right to a healthful environment, in 1970, the General Assembly adopted the Act. 415 ILCS 5/1 *et seq.* Section 4(e) of the Act provides that the Illinois EPA "shall have the duty to . . . take such summary enforcement action as is provided for by Section 34" of the Act. 415 ILCS 5/4(e) (2018). Section 34(b) of the Act provides the authority for the Illinois EPA to issue an administrative order to seal a facility when "the Agency finds that an imminent and substantial endangerment to the public health or welfare or the environment exists." 415 ILCS 5/34(b) (2018). On February 15, 2019, in order to adequately safeguard the public health and address an endangerment caused by Sterigenics' ethylene oxide emissions, the Illinois EPA exercised this authority in issuing the Seal Order against the Sterigenics facility in Willowbrook.

Argument

I. Plaintiff's Due Process Claim in Count I Fails as a Matter of Law Pursuant to Fed. R. Civ. P. 12(b)(6)

In Count I of Plaintiff's Complaint, Plaintiff argues that the Seal Order violates its due process rights. Plaintiff's Count I fails as a matter of law. The U.S. Supreme Court, Seventh Circuit, and Illinois courts have all made clear that "administrative action resulting in deprivation of a property interest without a prior hearing is justified when, as here, it responds to situations in which swift action is necessary to protect the public health and safety." *See, e.g., Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 266 (1981). In *Hodel*, the Court held that provisions of the Surface Mining Control and Reclamation Act, which allow the Secretary of Interior to immediately order total or partial cessation of a surface mining operation whenever he determines that operation creates immediate danger to health or safety of public or can reasonably be expected to cause significant, imminent environmental harm, and thereafter

provide the mine operator the ability to immediately request temporary relief from the cessation, did not deny due process. *Id.* at 298.

The Seventh Circuit has concurred that predeprivation hearings are not required in all instances. According to the court, it does not "make a lot of sense to say that when a postdeprivation hearing not only is feasible but will give the deprived individual a completely adequate remedy . . . due process requires a right to a predeprivation hearing as well." *Ellis v. Sheahan*, 412 F.3d 754, 758 (7th Cir. 2005). Section 34(d) of the Act provides two avenues for the postdeprivation process: a plaintiff may either pursue a "a hearing [in front of the Illinois Pollution Board] in accord with Section 32 of [the] Act to determine whether the seal should be removed," or "seek immediate injunctive relief." 415 ILCS 5/34(d) (2018).

Similarly, Illinois courts have consistently found that "where the public health is threatened, an administrative agency may act first and litigate later." *Conrail Corp.*, 251 Ill. App. at 560 (holding that due process was not violated by an *ex parte* order to remove rail cars with municipal solid waste because potential release of hazardous waste into environment justified only a postdeprivation hearing). "There is a strong public interest in protecting the public health and environment. Accordingly, statutes which were enacted for the protection and the preservation of public health are to be given extremely liberal construction for the accomplishment and maximization of their beneficial objectives. Consequently, the lack of a pre-enforcement hearing does not offend due process principles." *Id.* (citing *City of Quincy v. Carlson*, 163 Ill. App.3d 1049, 1054 (4th Dist. 1987)).

Like Section 34 of the Act, Section 303 of the federal Clean Air Act, 42 U.S.C. § 7603, allows the U.S. EPA to issue an administrative order to cease operations that it deems to be "presenting an imminent and substantial endangerment to public health or welfare, or the environment." *Id.* U.S. EPA guidance explains that Section 303 is a "precautionary provision,

aimed at the avoidance of potential harm," including but not limited to "chronic exposure to air pollution [that] causes endangerment by cumulative effect . . . ."[5] This guidance also makes clear that [p]revention and curtailment of an air pollution emergency is initially the responsibility of State and local governments."[6] In fact, the federal government can initiate a Section 303 action only if there is "evidence that appropriate State or local authorities have not acted to abate such sources."[7] Section 303 further provides that the operator may bring an injunctive action challenging the administrative order *subsequent to* the U.S. EPA's action.

Indeed, the Clean Air Act *mandates* that Illinois have immediate order authority in State law. In order to administer the Clean Air Act in Illinois, the U.S. EPA must approve an "implementation plan" submitted by IEPA. Specifically, Section 110(a)(2)(G) of the Clean Air Act requires that each implementation plan submitted by a State "shall provide for authority comparable to that in section 7603 [Section 303]." 42 U.S.C. § 7410(a)(2)(G). In a proposed rule approving an Illinois implementation plan, the U.S. EPA noted that Section 34(b) of the Act fulfills this requirement. Approval and Promulgation of Air Quality Implementation Plans; Illinois; Infrastructure SIP Requirements for the 2008 Ozone, 2010 NO2, and 2010 SO2 NAAQS, 79 Fed. Reg. 40,693-01 (July 14, 2014) (Proposed Rule). The U.S. EPA later approved Illinois' plan, which mirrors Section 303. *See* Approval and Promulgation of Air Quality Implementation Plans; Illinois; Emission Limit Infrastructure SIP Requirements for the 2008 Ozone, 2010 NO2, and 2010 SO2 NAAQS, 80 Fed. Reg. 29535 (May 22, 2015).

Finally, Plaintiff's allegations that the Seal Order was substantively improper do not constitute a due process violation. (*See, e.g.* Dkt. 1 ¶¶ 2-3, 11-23, 27). The true thrust of

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[5] *Guidance on Use of Section 303 of the Clean Air Act*, U.S. EPA 2 (September 15, 1983), https://www.epa.gov/enforcement/guidance-use-section-303-clean-air-act-caa.
[6] *Id.* at 6.
[7] *Id.* at 5.

Plaintiff's complaint is that the Seal Order was incorrect as a matter of Illinois state law. *Id.* But those questions, as discussed below, are not reviewable by a federal court. This Court should reject Plaintiff's attempt to circumvent the procedures provided in the Act by requesting federal review of a state agency's determination that an endangerment existed under state law. *Bond v. Atkinson*, 728 F.3d 690, 693 (7th Cir. 2013) ("state law cannot be enforced through § 1983"). Section 34(d) of the Act, 415 ILCS 5/34(d), provides Plaintiff with full due process, and any challenge that it may have to the Seal Order is properly brought in state court.

II. Plaintiff's Count II Provides No Independent Basis for Federal Jurisdiction and Should Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(1).

Plaintiff claims this Court has federal court jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367 because Count I is brought under 42 U.S.C. § 1983. Absent its Due Process claim, which as set forth above should be dismissed, Plaintiff's Complaint should be dismissed because Count II provides no independent basis for federal court jurisdiction.

Plaintiff previously removed the IAG Action regarding the underlying events leading up to the Seal Order, which is pending now before Judge Lee. In that case, Plaintiff claimed that federal law controlled the IEPA's claims, and therefore removal to federal court was proper. Defendants here argued that state law issues only were at play, and Plaintiff's misguided preemption defense did not give rise to federal question jurisdiction:

> Defendant argues that Plaintiff's state law claims are preempted by the Clean Air Act, or put differently, that compliance with the Clean Air Act is a complete defense to Plaintiffs' state law claims. (*See, e.g.*, Dkt. at p. 1.) But preemption is an affirmative defense that does not provide federal jurisdiction to support removal. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue"); *Chicago Tribune Co. v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001, 1003 (7th Cir. 2012) ("*Grable* does not alter the rule that a potential federal defense is not enough to create federal jurisdiction under § 1331").

(IAG Action, Dkt. 36 at 2.)

That law applies even more forcefully here, where Plaintiff challenges an Illinois agency's decision to issue a seal order under Illinois law. No federal question jurisdiction exists, and the Court should dismiss Count II.

III. Plaintiffs' Claims Are Barred By The Eleventh Amendment

Furthermore, Plaintiff's entire action is barred by the Eleventh Amendment. The Eleventh Amendment "bars federal jurisdiction over suits brought against a state." *MCI Telecomms. Corp. v. Ill. Bell Telephone Co.*, 222 F.3d 323, 336 (7th Cir. 2000). This immunity afforded to the states, however, is not absolute. *Id.* There are three exceptions to Eleventh Amendment immunity: (1) where Congress abrogates a state's immunity from suit; (2) "where the state itself consents to being sued in federal court"; and (3) "under the doctrine articulated by the Supreme Court in *Ex parte Young*, [209 U.S. 123 (1908)]," which allows suits for prospective relief against officials in their official capacity. *Council 31 of AFSCME, AFL-CIO v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012). Plaintiff brought a federal claim against a state agency and a state official, both of whom are protected from suit by the Eleventh Amendment here. As to the former, "[s]tate agencies are treated the same as states" because "a state agency is the state for purposes of the eleventh amendment." *Kroll v. Bd. of Trustees of Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991). Therefore, a state agency cannot be sued unless the waiver or abrogation exception applies. It is well-established that states are not "persons" under § 1983 and that Congress has not abrogated their immunity. *Joseph v. Bd. of Regents of Univ. of Wis. Sys.*, 432 F.3d 746, 749 (7th Cir. 2005) ("Because the Board is an 'arm of the state' and Congress has not abrogated its immunity in § 1983 actions, this suit is barred by the Eleventh Amendment."). Nor has IEPA waived its immunity. Accordingly, the due process claim against IEPA should be dismissed.

Moreover, Plaintiff has failed to allege that the *Ex parte Young* exception applies. Under the *Ex parte Young* doctrine, courts "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (internal quotation marks omitted). Here, the alleged violation under the procedural due process claim is not the Seal Order, "but instead, the fact that [it] occurred without an adequate opportunity to be heard." *See Sonnleitner v. York*, 304 F.3d 704, 718 (7th Cir. 2002). And though Plaintiff presents numerous allegations as to how the Seal Order itself is a continuing harm its business operations, it fails to describe how the lack of process is an ongoing violation. Moreover, for the reasons discussed above, the State provides to Plaintiff several postdeprivation procedures that Plaintiff could, but has chosen not to, take advantage of. In sum, the procedural due process claim against Acting Director Kim in his official capacity should also be dismissed.

As a final matter, the Eleventh Amendment also bars the section 34(b) claim against IEPA and Acting Director Kim. Indeed, as the Supreme Court held, "federal courts lack[ ] jurisdiction to enjoin . . . state institutions and state officials on the basis of . . . state law." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 124-25 (1984); *see also id.* at 106 ("A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

IV. Conclusion

Plaintiff respectfully requests that the Court grant Defendants' Emergency Motion to Dismiss, and such other relief as this Court deems proper.

Respectfully Submitted,

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